IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 4TH DAY OF MARCH, 2020

PRESENT

THE HON'BLE MR. JUSTICE ARAVIND KUMAR

AND

THE HON'BLE MR. JUSTICE HEMANT CHANDANGOUDAR

C.E.A.NO.45/2015
C/W
C.E.A.NO.46/2015

IN C.E.A.NO.45/2015:

BETWEEN:

COMMISSIONER OF SERVICE-TAX
SERVICE TAX COMMISSIONERATE-II
TTMC/BMTC BUILDING, DOMLUR
BANGALORE - 560 071. ...APPELLANT

(BY SRI. JEEVAN J NEERALGI, ADVOCATE)

AND:

SOBHA DEVELOPERS LTD.,
SOBHA CORPORATE OFFICE
SARJAPUR, MARATHHALLI OUTER
RING ROAD (ORR), DEVARBISANHALLI
BELLANDUR POST
BANGALORE - 560 013. ...RESPONDENT

(BY SRI. RAVI RAGHAVAN, ADVOCATE FOR
SRI. G.SHIVADASS, ADVOCATE)

THIS APPEAL IS FILED UNDER SECTION 35G OF THE CENTRAL EXCISE ACT PRAYING TO ALLOW THE APPEAL OF THE APPELLANT AND DECIDE THE SUBSTANTIAL QUESTIONS OF LAW AS FRAMED ABOVE AND SET ASIDE THE FINAL ORDER NO.20039/2015 DATED:06.1.2015 PASSED BY THE CUSTOMS, CENTRAL EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, SOUTH ZONE BENCH, BANGALORE.

IN C.E.A.NO.46/2015:

BETWEEN:

COMMISSIONER OF SERVICE TAX
SERVICE TAX COMMISSIONERATE-II
TTMC/BMTC BUILDING, DOMLUR
BANGALORE - 560 071. ...APPELLANT

(BY SRI. JEEVAN J NEERALGI, ADVOCATE)

AND:

SOBHA DEVELOPERS LTD.,
SOBHA CORPORATE OFFICE
SARJAPUR, MARATHAHALLI OUTER
RING ROAD (ORR), DEVARBISANAHALLI
BELLANDUR POST
BANGALORE - 560 013. ...RESPONDENT

(BY SRI. RAVI RAGHAVAN, ADVOCATE FOR
SRI. G. SHIVADASS, ADVOCATE)

THIS APPEAL IS FILED UNDER SECTION 35G OF THE CENTRAL EXCISE ACT PRAYING TO ALLOW THE APPEAL OF THE APPELLANT AND DECIDE THE SUBSTANTIAL QUESTIONS OF LAW AS FRAMED ABOVE AND SET ASIDE THE FINAL ORDER NO.20303/2015 DATED:11.02.2015 PASSED BY THE CUSTOMS, CENTRAL EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, SOUTH ZONE BENCH, BANGALORE.

THESE APPEALS COMING ON FOR HEARING THIS DAY, ***ARAVIND KUMAR J,*** DELIVERED THE FOLLOWING:

JUDGMENT

These two appeals have been preferred by the revenue being aggrieved by the order dated 6.1.2015 and 11.02.2015 respectively, passed by the CESTAT, South Zone Bench, Bengaluru. By order dated 29.8.2018

appeals came to be admitted to consider the following substantial questions of law:

> "1) Whether the principle of mutuality is applicable to services provided by the club to its members and do not amount to rendition of service from one person to another and would not be considered as taxable service for the purpose of levy of service tax?
>
> 2) Whether under the facts and circumstances of the case, the CESTAT is right in holding that the services are not taxable on the principle of mutuality of overriding the statutory provisions contained in Section 65(105)(zzze) and 65(25)(aa) of the Finance Act, 1994?
>
> 3) Whether under the facts and circumstances of the case, the activities of club amount to service provided to the members and liable for service tax?"

2. We have heard the arguments of Sri.Jeevan J Neeralgi, learned counsel appearing for appellant and Sri. Ravi Raghavan, learned counsel appearing on behalf of Sri.G.Shivadass for respondent.

3. Perused the impugned orders and also the orders appended to the appeal memorandums.

4. Respondent herein is engaged in the business of construction of complex and roads under the category "construction of complex services and works contract service" under the Finance Act, 1994. On the ground that respondent was rendering taxable service under the category of "Club or Association Service" as defined under Section 65(105)(zzze) of the Finance Act, 1994 and liable for payment of service tax, which is said to have come to limelight during the course of audit and observations having been made that agreements entered into by the respondent with their customers for the purpose of residential apartments and certain amounts are collected as non-refundable deposits towards "Club House and Swimming Pool", show cause notices (for short SCN) dated 18.4.2012 and 20.11.2012 came to be issued to the respondent proposing to demand a sum of Rs.1,55,67,058/- and Rs.1,09,770/- relevant to the period 2006-2011 and April 2011-March 2012 respectively. The Adjudicating Authority, after considering the reply filed to the SCN thereof by the

respondent, by orders dated 20.5.2013 and 25.10.2013, confirmed the demand made in the show cause notice. Appeals filed against said orders before CESTAT came to be accepted and were allowed by orders dated 6.1.2015 and 11.2.2015 respectively, on the ground that the issue as to whether the services provided by a club to its members are liable to service tax under the category "Club or Association Service" was no more *res integra,* in the light of the decisions rendered by Jarkhand and Gujarat High Courts, which had been followed by the Tribunal in M/s. Enchanted Woods Club Ltd., Vs. CCE, Ludhiana reported in 2014-TIOL-849-CESTAT-DEL.

5. Sri.Jeevan.J.Neeralgi, learned counsel appearing for the appellant would vehemently contend that CESTAT had failed to appreciate that clubs are either incorporated under the Companies Act or registered under the Societies Registration Act, which would constitute separate legal entity or in other words, having a separate legal identity from its members and therefore, doctrine of mutuality between the members and clubs

bears no significance in the context of taxable service provided by clubs and association and *vis a vis* to its members. Hence, he prays for substantial questions of law formulated hereinabove being answered in favour of the revenue.

6. Per-contra, Sri.Ravi Raghavan, learned counsel for respondent would support the order passed by the Tribunal by placing reliance on the judgment of the Apex Court in the case of STATE OF WEST BENGAL VS. CALCUTTA CLUB LIMITED in Civil Appeal No.4184/2009 and other connected matters reported in 2019 SCC ONLINE SC 1291. Hence, he prays for answering the substantial questions of law in favour of the assessee i.e., respondent and against the revenue.

7. Having heard the learned Advocates appearing for the parties and on perusal of the entire case papers as well as the judgment rendered by the Apex Court in the case of STATE OF WEST BENGAL VS. CALCUTTA CLUB LIMITED, we have no hesitation to arrive at the conclusion that questions of law raised in these appeals

is an issue, which is no more *res integra* in the light of finding recorded by the Apex Court which is to the following effect:

> "81. The definition of "club or association" contained in Section 65(25a) makes it plain that any person or body of persons providing services for a subscription or any other amount to its members would be within the tax net. However, what is of importance is that anybody "established or constituted" by or under any law for the time being in force, is not included. Shri Dhruv Agarwal laid great emphasis on the judgments in DALCO Engineering Private Limited v. Satish Prabhakar Padhye, (2010) 4 SCC 378 (in particular paragraphs 10, 14 and 32 thereof) and CIT, Kanpur v. Canara Bank, (2018) 9 SCC 322 (in particular paragraphs 12 and 17 therein), to the effect that a company incorporated under the Companies Act cannot be said to be "established" by that Act. What is missed, however, is the fact that a Company incorporated under the Companies Act or a cooperative society registered as a cooperative society under a State Act can certainly be said to be "constituted" under any law for the time being in force. In R.C. Mitter & Sons, Calcutta v. CIT, West Bengal, Calcutta, (1959) Supp. 2 SCR 641, this Court had occasion to construe what is meant by "constituted" under an instrument of partnership, which words occurred in Section 26A of the Income Tax Act, 1922. The Court held:
>
> "The word "constituted" does not necessarily mean "created" or "set up",

though it may mean that also. It also includes the idea of clothing the agreement in a legal form. In the Oxford English Dictionary, Vol. II, at pp. 875 & 876, the word "constitute" is said to mean, inter alia, "to set up, establish, found (an institution, etc.)" and also "to give legal or official form or shape to (an assembly, etc.)". Thus the word in its wider significance, would include both, the idea of creating or establishing, and the idea of giving a legal form to, a partnership. The Bench of the Calcutta High Court in the case of R.C. Mitter and Sons v. CIT [(1955) 28 ITR 698, 704, 705] under examination now, was not, therefore, right in restricting the word "constitute" to mean only "to create", when clearly it could also mean putting a thing in a legal shape. The Bombay High Court, therefore, in the case of Dwarkadas Khetan and Co. v. CIT [(1956) 29 ITR 903, 907], was right in holding that the section could not be restricted in its application only to a firm which had been created by an instrument of partnership, and that it could reasonably and in conformity with commercial practice, be held to apply to a firm which may have come into existence earlier by an oral agreement, but the terms and conditions of the partnership have subsequently been reduced to the form of a document. If we construe the word "constitute" in the larger sense, as indicated above, the difficulty in which the learned Chief Justice of the Calcutta High Court found himself, would be obviated inasmuch as the section would take in cases both of firms coming into existence by virtue of written documents as also those which may have initially come into existence by oral agreements, but which had subsequently been constituted under written deeds."

> 82. It is, thus, clear that companies and cooperative societies which are registered under the respective Acts, can certainly be said to be constituted under those Acts. This being the case, we accept the argument on behalf of the Respondents that incorporated clubs or associations or prior to 1st July, 2012 were not included in the service tax net."

In the light of the authoritative pronouncement of Hon'ble Apex Court holding that the companies and co-operative societies which are registered under the respective Acts can be said to be constituted under those Acts and the clubs or associations incorporated prior to 1.7.2012 were not included in the service tax net, necessarily, we have to answer the substantial questions of law against the revenue and in favour of the respondent-assessee and accordingly, it is ordered.

Hence, the following:

ORDER

(i) Appeals are dismissed by answering the substantial questions of law in favour of respondent-assessee and against appellant-revenue.

(ii) Final orders passed in 20039/2015 and 20303/2015 by the CESTAT dated 6.1.2015 and 11.2.2015 in the respective appeals are hereby affirmed.

(iii) No order as to costs.

SD/-
JUDGE

SD/-
JUDGE

bkp